

Department of Energy

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Subpart C—Safeguarding Privacy and Employee Rights

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Subpart D—Polygraph Examination and Examiner Standards

- 709.31 DOE standards for polygraph examiners and polygraph examinations.
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AUTHORITY: 42 U.S.C. 2011, *et seq.*, 7101, *et seq.*, 7144b, *et seq.*, 7383h–1; 50 U.S.C. 2401, *et seq.*

SOURCE: 71 FR 57392, Sept. 29, 2006, unless otherwise noted.

Subpart A—General Provisions

§ 709.1 Purpose.

This part:

- (a) Describes the categories of individuals who are subject for counterintelligence evaluation processing;
- (b) Provides guidelines for the counterintelligence evaluation process, including the use of counterintelligence-scope polygraph examinations, and for the use of event-specific polygraph examinations; and
- (c) Provides guidelines for protecting the rights of individual DOE employees and DOE contractor employees subject to this part.

§ 709.2 Definitions.

For purposes of this part:

Access authorization means an administrative determination under the Atomic Energy Act of 1954, Executive Order 12968, or 10 CFR part 710 that an individual is eligible for access to classified matter or is eligible for access to, or control over, special nuclear material.

Adverse personnel action means:

(1) With regard to a DOE employee, the removal, suspension for more than 14 days, reduction in grade or pay, or a furlough of 30 days or less as described in 5 U.S.C. Chapter 75; or

(2) With regard to a contractor employee, the discharge, discipline, or denial of employment or promotion, or any other discrimination in regard to hire or tenure of employment or any term or condition of employment.

Contractor means any industrial, educational, commercial, or other entity, assistance recipient, or licensee, including an individual who has executed an agreement with DOE for the purpose of performing under a contract, license, or other agreement, and including any subcontractors of any tier.

Counterintelligence or CI means information gathered and activities conducted to protect against espionage, other intelligence activities, sabotage, or assassinations conducted for or on behalf of foreign powers, organizations or persons, or international terrorist activities, but not including personnel, physical, document or communications security programs.

Counterintelligence evaluation or CI evaluation means the process, possibly including a counterintelligence scope polygraph examination, used to make recommendations as to whether certain employees should have access to information or materials protected by this part.

Counterintelligence program office means the Office of Counterintelligence in the Office of Intelligence and Counterintelligence (and any successor office to which that office's duties and authorities may be reassigned).

Counterintelligence-scope or CI-scope polygraph examination means a polygraph examination using questions reasonably calculated to obtain counterintelligence information, including questions relating to espionage, sabotage, terrorism, unauthorized disclosure of classified information, deliberate damage to or malicious misuse of a United States Government information or defense system, and unauthorized contact with foreign nationals.

Covered person means an applicant for employment with DOE or a DOE contractor, a DOE employee, a DOE contractor employee, and an assignee or detailee to DOE from another agency.

DOE means the Department of Energy including the National Nuclear Security Administration (NNSA).

Foreign nexus means specific indications that a covered person is or may be engaged in clandestine or unreported relationships with foreign powers, organizations or persons, or international terrorists; contacts with foreign intelligence services; or other hostile activities directed against DOE facilities, property, personnel, programs or contractors by or on behalf of foreign powers, organizations or persons, or international terrorists.

Human Reliability Program means the program under 10 CFR part 712.

Intelligence means information relating to the capabilities, intentions, or activities of foreign governments or elements thereof, foreign organizations or foreign persons.

Local commuting area means the geographic area that usually constitutes one area for employment purposes. It includes any population center (or two or more neighboring ones) and the surrounding localities in which people live and can reasonably be expected to travel back and forth daily to their usual employment.

Materials means any “nuclear explosive” as defined in 10 CFR 712.3, and any “special nuclear material,” hazardous “source material,” and hazardous “byproduct material” as those terms are defined by the Atomic Energy Act of 1954 (42 U.S.C. 2014).

National security information means information that has been determined pursuant to Executive Order 12958, as amended by Executive Order 13292, or any predecessor order to require protection against unauthorized disclosure and is marked to indicate its classified status when in documentary form.

NNSA means DOE’s National Nuclear Security Administration.

No opinion means an evaluation of a polygraph test by a polygraph examiner in which the polygraph examiner cannot render an opinion.

Polygraph examination means all activities that take place between a

Polygraph Examiner and an examinee (person taking the test) during a specific series of interactions, including the pretest interview, the use of the polygraph instrument to collect physiological data from the examinee while presenting a series of tests, the test data analysis phase, and the post-test phase.

Polygraph examination records means all records of the polygraph examination, including the polygraph report, audio-video recording, and the polygraph consent form.

Polygraph instrument means a diagnostic instrument used during a polygraph examination, which is capable of monitoring, recording and/or measuring at a minimum, respiratory, electrodermal, and cardiovascular activity as a response to verbal or visual stimuli.

Polygraph report means a document that may contain identifying data of the examinee, a synopsis of the basis for which the examination was conducted, the relevant questions utilized, and the examiner’s conclusion.

Polygraph test means that portion of the polygraph examination during which the polygraph instrument collects physiological data based upon the individual’s responses to questions from the examiner.

Program Manager means a DOE official designated by the Secretary or the Head of a DOE Element to make an access determination under this part.

Random means a statistical process whereby eligible employees have an equal probability of selection for a CI evaluation each time the selection process occurs.

Regular and routine means access by individuals without further permission more than two times per calendar quarter.

Relevant questions are those questions used during the polygraph examination that pertain directly to the issues for which the examination is being conducted.

Restricted data means all data concerning the design, manufacture, or utilization of atomic weapons; the production of special nuclear material; or the use of special nuclear material in the production of energy, but does not include data declassified or removed

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from the restricted data category pursuant to section 142 of the Atomic Energy Act of 1954.

Secret means the security classification that is applied to DOE-generated information or material the unauthorized disclosure of which reasonably could be expected to cause serious damage to the national security.

Secretary means the Secretary of Energy or the Secretary's designee.

Significant response means an opinion that the analysis of the polygraph charts reveals consistent, significant, timely physiological responses to the relevant questions.

Special Access Program or SAP means a program established under Executive Order 12958 for a specific class of classified information that imposes safeguarding and access requirements that exceed those normally required for information at the same classification level.

Suspend means temporarily to withdraw an employee's access to information or materials protected under § 709.3 of this part.

System Administrator means any individual who has privileged system, data, or software access that permits that individual to exceed the authorization of a normal system user and thereby override, alter, or negate integrity verification and accountability procedures or other automated and/or technical safeguards provided by the systems security assets for normal users.

Top Secret means the security classification that is applied to DOE-generated information or material the unauthorized disclosure of which reasonably could be expected to cause exceptionally grave damage to the national security.

Unresolved issues means an opinion by a CI evaluator that the analysis of the information developed during a CI evaluation remains inconclusive and needs further clarification before a CI access recommendation can be made.

§ 709.3 Covered persons subject to a CI evaluation and polygraph.

(a) *Mandatory CI evaluation.* Except as provided in § 709.5 of this part with regard to waivers, a CI evaluation, which may include a CI-scope polygraph examination, is required for any

covered person in any category under paragraph (b) of this section who will have or has access to classified information or materials protected under this paragraph. Such an evaluation is required for covered persons who are incumbent employees at least once every five years. DOE, in its sole discretion, may require a CI-scope polygraph examination:

(1) If the CI evaluation reveals foreign nexus issues;

(2) If a covered person who is an incumbent employee is to be assigned within DOE to activities involving another agency and a polygraph examination is required as a condition of access to the activities by the other agency; or

(3) If a covered person who is an incumbent employee is proposed to be assigned or detailed to another agency and the receiving agency requests DOE to administer a polygraph examination as a condition of the assignment or detail.

(b) Paragraph (a) of this section applies to covered persons:

(1) In an intelligence or counterintelligence program office (or with programmatic reporting responsibility to an intelligence or counterintelligence program office) because of access to classified intelligence information, or sources, or methods;

(2) With access to Sensitive Compartmented Information;

(3) With access to information that is protected within a non-intelligence Special Access Program (SAP) designated by the Secretary;

(4) With regular and routine access to Top Secret Restricted Data;

(5) With regular and routine access to Top Secret National Security Information; and

(6) Designated, with approval of the Secretary, on the basis of a risk assessment consistent with paragraphs (e) and (f) of this section, by a Program Manager for the following DOE offices and programs (and any successors to those offices and programs): The Office of the Secretary; the Human Reliability Program; the National Nuclear Security Administration (including the Office of Emergency Operations); and the Office of Health, Safety and Security.